Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1989

ILLARIO M. A. ZANNINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED RULING ON THE APPELLANT'S ARGUMENT THAT HE WAS DEPRIVED OF A FAIR TRIAL SINCE HE WAS UNABLE TO PROPERLY ASSIST IN HIS DEFENSE AND TESTIFY ON HIS OWN BEHALF DUE TO HIS FAILING MEDICAL CONDITION DURING THE PENDENCY OF HIS TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO REVERSE THE DISTRICT COURT'S RULING DENYING THE APPELLANT'S MOTION IN LIMINE TO EXCLUDE THE UNREDACTED PRIOR TESTIMONY OF THE UNAVAILABLE WITNESS DONALD SMOOT IN CONTRAVENTION OF HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FEDERAL RULES OF EVIDENCE i.e. (804 (b)(5)).

III. WHETHER THE APPELLATE COURT ERRED IN AFFIRMING THE DENIAL OF THE APPELLANT'S MOTION TO SUPPRESS ELECTRONIC SURVEILLANCE IN CONTRAVENTION OF THE APPELLANT'S RIGHTS UNDER FOURTH AMENDMENT.

IV. WHETHER THE APPELLATE COURT ERRED BY IMPROPERLY UPHOLDING THE ADMISSION OF "BAD ACT" EVIDENCE ON THE PART OF OTHER INDIVIDUALS AND IMPUTING THE SAME TO THE APPELLANT IN CONTRAVENTION OF THE APPELLANT'S SIXTH AMENDMENT RIGHTS AND FEDERAL RULE OF EVIDENCE 403 AND 404 (B).

V. WHETHER THE APPELLATE COURT ERRED IN DENYING THE APPELLANT'S REQUEST TO INCORPORATE ARGUMENTS RELATED TO PRE-TRIAL MOTIONS.

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Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered on January 10, 1990.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming the conviction in the United States District Court, District of Massachusetts, is annexed as Appendix (App.) A.

JURISDICTION

The memorandum and order of the United States Court of Appeals for the First Circuit was entered on January 10, 1990. The mandate was issued on January 31, 1990. Jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional provisions involved are listed in full in Appendix 1.

PRAYER FOR REVIEW

The petitioner avers that this Honorable Court should review this case. This case involves serious Sixth Amendment issues in regard to the defendant's inability to functionally assist in his own trial. This case presents an opportunity for this Honorable Court to make a definitive ruling on the constitutional underpinnings whenever defendants challenge trial proceedings on medical grounds.

The petitioner further avers that this Honorable Court should choose to review this matter on the basis of the evidentiary challenge to the testimony of Donald Smoot.

The petitioner proffers that the unredacted, uncross-examined testimony violates the Fifth and Sixth Article of the United States Constitution as well as the Federal Rules of Evidence – 804 (b)(5).

The petitioner states that this Honorable Court has not addressed any case in this particular posture, and that there is a split in the Circuits regarding the admission of this testimony under the Federal Rules of Evidence.

The petitioner further avers that this Honorable Court should hear the following three arguments because of the constitutional dimensions resulting from the omissions of the Circuit Court, and of the erroneous decision on the "bad act" evidence.

THE BASIS FOR FEDERAL JURISDICTION

In this case, the petitioner was charged with criminal offenses which constituted the basis for federal jurisdiction in the United States District Court for the District of Massachusetts.

STATEMENT OF THE CASE AND FACTS

On March 27, 1981, the Government obtained a warrant authorizing electronic interception at 51 North Margin Street, Boston, Massachusetts. The appellant was designated as a target of the surveillance.

Thereafter, electronic surveillance was conducted of the appellant, and others, both at 51 North Margin Street and at 98 Prince Street, Boston, Massachusetts.

On or about September 19, 1983, a massive "RICO" indictment and numerous separate other substantive charges were returned by a Grand Jury.

The appellant was named as one of the defendants.

Subsequent to the commencement of trial in the multi-count indictment, as a result of the appellant's severe cardiac condition, he suffered a "heart attack" requiring extensive hospitalization.

The appellant was severed from the other defendants for trial at a later date.

Thereafter, medical hearings were conducted as to the appellant's physical ability to stand the rigors and stress of trial. The result was that the trial court ruled the appellant

could not physically withstand the emotional and physical rigor of a trial on all the counts in the indictment, but could be tried on "one or two counts at a time".

The Government then moved to sever three counts from the indictment and for trial. Over objection of the appellant, the motion was granted.

The three counts tried *jointly* were two gambling offenses (18 U.S.C. 1955) and one extortionate extension of Credit (18 U.S.C. 892 (a)). The appellant was tried before Nelson, D.J., and a jury on various dates between January 27 to March 6, 1987.

The trial of the case was interrupted several times due to the appellant being hospitalized. On February 17, 1987, the appellant was rushed to the Bon Secours Hospital in Lawrence, Massachusetts after he suffered another serious coronary episode.

The attending physician at the hospital refused to discharge the appellant and the Trial Court ordered the United States Marshalls to physically remove the appellant from his hospital bed and continue the trial.

By this time the appellant's condition was so exacerbated due to his physical state and the massive doses of medication that he was only quasi-cognizant of what was taking place in Court.

During the course of the trial the evidence came primarily from numerous tape recorded conversations; the reading of testimony of a deceased witness, and several Government agents.

The facts adduced were that the appellant was a participant in a card game at 51 North Margin Street, Boston, Massachusetts. The facts further showed that the appellant was acquainted with certain people, basically co-defendants in the Anguilo case (CR 84-235), U.S.D.C. Massachusetts, and that he had a reputation for being violent.

Most of the evidence at trial related to an "illegal organization" and the acts of others.

The rest of the factual recitations are contained in the body of the petition.

The appellant was convicted of all three counts on March 6, 1987. He was sentenced to a total of thirty (30) years.

The petitioner appealed the decision to the United States Court of Appeals for the First Circuit.

His conviction was affirmed by that Court on January 10, 1990.

ARGUMENT

I. THE APPELLATE COURT ERRED BY DENYING THE APPELLANT'S ARGUMENT THAT HE WAS DEPRIVED OF A FAIR TRIAL SINCE HE WAS UNABLE TO PROPERLY ASSIST IN HIS DEFENSE AND TESTIMONY ON HIS OWN BEHALF DUE TO HIS FAILING MEDICAL CONDITION DURING THE PENDENCY OF HIS TRIAL.

The Appellate Court in denying appellant's claim that he was deprived of a fair trial because his physical condition deteriorated during trial, ruled that the Trial Court was correct in denying appellant's Motion to Continue or Dismiss.

The Circuit Court found that after extensive pre-trial hearings the Trial Court severed the appellant; allowed a trial on only three counts; provided for medical supervision; and, followed the suggestions of the expert physicians. However, this *was not* the specific issue argued. The thrust of the issue presented centered on whether the appellant was deprived of a fair trial because as the trial progressed, his physical condition degenerated to the point where he was unaware of the proceedings and could not testify.

On the first day of the RICO (Anguilo) trial, (July 10, 1985), the appellant was admitted to the Massachusetts General Hospital with severe chest pains.

Three days later he was re-admitted with further complaints of chest pains. On that date, (July 17, 1985), he suffered a severe myocardial infarction in conjunction with two episodes of ventricular fibrillation (a form of cardiac arrest where the heart stops beating and merely quivers), and a brief episode of ventricular tachycardia (an arrythmic disturbance of the heartbeat). Following each episode of ventricular fibrillation, the appellant was revived with shock

treatment; the medical consensus at a subsequent hearing was that he would have died had he not been in a hospital setting. With the Government's concurrence, the appellant was severed from the "Anguilo" ongoing trial on July 18, 1985. (Nelson Decision, p. 3).

After the appellant's release from Massachusetts General Hospital on August 10, 1985, the appellant remained hospitalized at Lemuel Shattuck Hospital (a State facility). The appellant had further medical hearings on various dates in August and September 1985. The Court heard from various physicians chosen both by the appellant and the Government. In addition, the Court chose the Chiefs of Cardiology of three major teaching hospitals in the Boston area in order to assist the Court in reaching an assessment of the appellant's medical condition.

The panel reported to the Court in May and August 1986 in the form of a questionnaire and answer report.

The Court digested these diagnoses but ordered the appellant to the instant trial on the three substantive counts.

During the trial itself, the appellant's deteriorating medical condition manifested itself in several episodes on several occasions.

The appellant fell asleep during trial, or was incoherent on several significant instances.

> MR. BALLIRO: "He is falling asleep. I can hear him almost snoring, Your Honor. I am concerned that he is going to fall over. That's what happened to him before. I am going to ask that the Court recess."
>
> (Trial Transcripts (T.Tr.) Vol. II. p.95).

The conditions at the Lawrence Jail also caused defense counsel to make a strenuous objection.

> MR. BALLIRO: I merely want to address the Court concerning Mr. Zannino's medical condition.
>
> He tells me that – and I accept it because it have been up there and seen the condition – that he gets no sleep at all at night because of the constant yelling. And it is yelling. It's like a zoo up there

> and there is no way in which the authorities who are responsible for the institution can control that. There is a constant, incessant not just hum or buzz, but yelling and screaming and radios playing all night long.
>
> Now, he is doing everything he can to stay alert, stay awake so that he can follow these proceedings. But I suggest respectfully that the procedure that we are following of daily Court days is too much for him and that it loads – I know as far as the prospect of his being here at the end of this trial – and I am going to request the Court consider going to a schedule of trying every other day on Mondays, Wednesdays and Fridays. He just can't take much more of it, Your Honor.
>
> (T.Tr. Vol. III, pp. 137-8).

The Court refused to change the schedule. Later on in the trial Mr. Zannino again began to have trouble staying fully conscious.

> MR. BALLIRO: Your Honor, I am going to ask for a recess today. Mr. Zannino has been nodding off and I talked to him during the course of lunch. And I talked to the medics who observed that he had been dozing off several times this morning. And as the afternoon wears on, he just gets tireder and tireder (sic), if Your Honor please. I don't think he can really muster the attention at all this late in the afternoon for us to go on.
>
> (T.Tr. Vol. VIII, p. 115).

The same argument was made on the following trial session. There the Judge recognized that Zannino was not lucid and commented to the effect that the appellant wakes right up and so forth. However, rather than acceding to counsel's request to adjourn the Court responded that "I want to get a little more out of this day. I don't know what to say to you". (T.Tr. Vol. IX, p. 74).

On February 17, 1987, the appellant was rushed to the Bon Secours Hospital in Lawrence, Massachusetts after he suffered yet another serious coronary episode. (See, T.Tr. Vol. XV).

This episode only exacerbated the appellant's already extremely weakened condition. (T.Tr. Vol. XVI, pp. 51-2). This entire unfortunate scenario reached its nadir when defense counsel indicated to the Judge that the appellant was too ill to testify on his own behalf. (T.Tr. Vol. XX, (3-3-87), p. 8).

Prior to the instant trial, and as the result of these numerous hearings and questionnaires relating to the appellant's deteriorating physical condition, the trial Court ruled on the appellant's legal condition. Based upon the testimony and opinions of the physicians, the trial Judge found that the appellant was suffering from a severe cardiac condition with complications and the condition was such that it would not improve. The Court had also ruled that the nature of the condition was such that it would continue to deteriorate.

Again, the Court then ruled that the appellant would not be able to stand the rigors of a long trial on a multi-appellant, multi-count indictment. The Court severed the counts and the Government elected to proceed on the counts which are the subject of this appeal.

At the opening of the trial, the Court made special arrangements for the availability of emergency medical treatment at the Courthouse. The Court also ordered shortened hours of trial. Obviously, the Court recognized the serious nature of the appellant's condition and the likelihood of his suffering cardiac arrest during the proceedings.

It was in this operose environment that this gravely ill appellant was forced to trial over the staunch objections of his trial counsel.

At the outset of the trial, in the opening statement, defense counsel unequivocally told the jury that the appellant, Mr. Zannino, would be testifying. (T.Tr. Vol. I, p. 27). He stated that the nature of the charges and evidence required the appellant, and only the appellant, to testify to rebut certain inferences. As related, the appellant's medical, physical and mental condition deteriorated as the trial proceeded. By the time the Government rested, the appellant's condition had deteriorated to the point where he could no longer testify. He was physically debilitated and the increase in medication had put him in a quasi-stupor.

The Court inquired of counsel as to whether or not the appellant would be testifying to which counsel responded in the presence of the jury:

> "If, Your Honor please, I think this is going to be redundant. I made the decision Mr. Zannino is not going to testify. I don't feel he is well enough to testify."
>
> (T.Tr. Vol. XX, (3-3-87 p. 8).

The basic issues in this argument are whether the rulings of the trial Judge relating to the Appellant's medical condition, on his motions to continue, and the Court's failure to protect the appellant's right to call witnesses on his behalf, i.e., himself, deprived the appellant of minimum due process of law.

Despite the evidence of the appellant's deteriorating condition, (i.e., falling asleep in Court; being hospitalized during the trial), the Trial Court took no measure to protect the appellant's Constitutional rights.

Indeed, on one occasion, and against all medical advice to the contrary, the Court had the appellant physically removed from the Bon Secours Hospital and brought to Court without so much as a hearing. (Defense counsel had of course been arguing against the continuation of the trial from the outset.)

The conduct of the Trial Judge precluded the appellant from participation in the trial; and effectively precluded him from assisting in his defense and from testifying.

In *United States v. Alexander*, 869 F.2d 808, (5th Cir. 1989). By way of dicta, the Court held that in situations such as the instant case, the trial Court *must* conduct hearings to determine the fitness and awareness of the appellant to continue with the trial. See also, *United States v. Miller*, 513 F.2d 79 (5th Cir. 1975).

The most direct and blatant deprivation of the appellant's rights were his inability to testify on his own behalf. As stated above trial counsel in his opening statement stated to the jury that the appellant *would* testify.

By the time the case concluded, the medical condition of the appellant had deteriorated to the point that he should have

been in the hospital, let alone in the Courthouse in any condition to testify.

The Court in *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), recognized that the failure to produce important evidence, promised in an opening statement would have a disastrous and damaging effect upon a jury.

In the instant case, the Trial Court was well aware of the appellant's rapidly deteriorating condition. As related on a number of occasions, defense counsel pointed out that as a result of increased medication (40 – 45 mg. of valium daily, in addition to a myriad of heart related medication), the appellant *could not* even stay awake. After appellant was hospitalized and brought into Court against the doctors' orders, the Court was *well aware* that the appellant's physical condition precluded him from participating in his defense. At this point, (and especially when the Court was informed that the appellant was now too ill to testify), the Court should have conducted a hearing and made findings on the following factors:

1. The medical evidence;
2. The related evidence of appellant's treatment;
3. The availability of measures to further minimize the risks to appellant's health in subjecting him to continue with the trial;
4. The temporary or permanent character of the exacerbated physical problem; and,
5. The magnitude and seriousness of the case.

See, *United States v. Passman*, 455 F.Supp. 794 (D.C.D.C. 1978). Such a hearing is required even with no motion of the appellant. The Court has the obligation to insure that a trial is not merely a procedural formality and that the appellant's due process rights are *not* minimized. See, *United States v. Alexander, supra.*

In light of the overwhelming evidence of the appellant's physical condition; his inability to participate in his defense and his inability, through no fault of his own, to testify, the Trial Court erred in denying the appellant's motion to continue and not declaring a mistrial "Sua Sponte". Such an error

was a grave infringement of the appellant's Fifth and Sixth Amendment rights.

In response to this argument, the Appellate Court ruled (in an off-hand manner), that there was nothing *on the record* to indicate Zannino's deteriorating condition, and trial counsel did not bring it to the attention of the Trial Court.

This ruling again is inapposite to the record. In the first place, even the Government acceded to the apparent and obvious deterioration of the defendant. As stated in its brief:

> Here by contrast, competency of counsel is not in issue defense counsel rested his case over a month after his opening statement, *and it was readily apparent to the jury that appellant's explanation of this failing to testify was his ill health, and not because he could not otherwise testify as promised.* Moreover, appellant presented his defense, (see, *supra*, p. 47, 51-52), through cross-examination of witnesses, his own witnesses and arguments to the jury . . .
>
> (Brief of appellee, p. 69, Ft. Note 87).

Again the Trial Court was well *aware* of the defendant's condition. (See, *infra*). On one occasion after Mr. Zannino suffered a myocardial infarction forcing yet another suspension of trial, the Trial Court *ordered* the U.S. Marshall's to bring Zannino from the Bon Secours Hospital in Lawrence to Court. This was against the medical advice of the hospital physicians and the Trial Court had been appraised of this fact and the medical condition of the defendant by the hospital physicians.

The Appellate Court, disregarding the obvious knowledge on the part of the Trial Judge, ruled that there was nothing *in the record* to support this contention.

The Trial Judge was well aware of what was happening to Mr. Zannino and for the Appellate Court to rule on some technical procedural formality which would have amounted to an act of futility on the part of trial counsel, merely side-steps the issue.

The appellant was forced to stand trial as a "warm body", he was of no assistance to counsel. He was so heavily medicated that for much of the trial he was unaware of most of the

proceedings. Certainly, continuing the trial of this defendant was less than, to state it mildly, what the Constitution of the United States requires.

II. THE APPEALS COURT ERRED IN FAILING TO REVERSE THE DISTRICT COURT'S RULING DENYING THE APPELLANT'S MOTION IN LIMINE TO EXCLUDE THE UNREDACTED PRIOR TESTIMONY OF THE UNAVAILABLE WITNESS, DONALD SMOOT.

The appellant challenged this evidence on constitutional grounds alleging violations of the Fifth and Sixth Amendments to the United States Constitution in addition to violations of Federal Rule of Evidence, 804(b)(5).

The appellant contends that the Court of Appeals based their opinion on an erroneous adaptation of the facts.

Smoot was a cooperating Government witness who had been granted significant promises, inducements and rewards, in exchange for his testimony in a previous trial – *United States v. Gennaro Anguilo*, CR 83-235-N in the District of Massachusetts, Nelson, J. (As indicated infra, three counts of the multi-count RICO indictment has been severed, and the appellant was *not* being tried under the so-called RICO count).

The witness was cross-examined extensively by counsel for the defendants in that previous case and significantly the cross-examination demonstrated the lack of community of interest with the instant defendant and highlighted the adverse interest of those defendants to Mr. Zannino.

Here Mr. Smoot testified over a two day period at the "*Anguilo*", *supra*, trial and transcripts of his testimony were read to the jury in the instant case. (T.Tr. Vol. XXIV).

The evidence complained of consists of the government reading into evidence a transcript of the testimony of Smoot including an account of his playing poker at a card game at 51 North Margin Street and with respect to a Fourteen Thousand Dollar ($14,000) debt he allegedly owed to the appellant.

After perusing the legal landscape in regard to admissions of this type of evidence. The Court of Appeals began their analysis in this posture:

> To that end, we independently examine the circumstances surrounding Smoot's testimony in order to ascertain whether it passes sixth amendment muster. Before embarking upon this voyage, we first address, and reject, appellant's asseveration that, absent the catharsis of cross-examination, an unavailable declarant's earlier testimony can never be reliable enough to allay constitutional concerns. *While the point seems to be an open one in this circuit*, our sister circuits have uniformly admitted uncross-examined grand jury testimony into evidence at a subsequent trial where the declarant is no longer available and the requisite indicia of reliability exist. *See, e.g., United States v. Guinan*, 836 F.2d 350, 358 (7th Cir.), *cert. denied*, 108 S. Ct. 2871 (1988); *United States v. Marchini*, 797 F.2d 759, 764-65 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *United States v. Walter*, 696 F.2d 277, 280-81 (4th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983); *United States v. Barlow*, 693 F.2d 954, 963-65 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *United States v. Carlson*, 547 F.2d 1346, 1355-60 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). Although the practice seems impeccable, we need not go quite so far today. In this case, the reliability index is higher. Before the grand jury, testimony is not cross-examined *at all;* here, though Zannino's counsel never had an opportunity to question Smoot, the declarant was vetted at the earlier *trial by defense attorneys who shared appellant's interest in denigrating Smoot's credibility*. The case before us is, therefore, a much stronger one for admissibility: *the functional equivalent of cross-examination by the defendant was present here, bolstering the inherent reliability of the testimony. See Barker v. Morris*, 761 F.2d 1396, 1402-03 (9th Cir. 1985) (approving admission of testimony of deceased witness given at preliminary hearing and used at trial against defendant who was not

> represented at the preliminary hearing), *cert. denied*, 474 U.S. 1063 (1986). Thus, Smoot's sworn statements at the Anguilo's trial, as opposed to say, grand jury testimony, offered a "particularized guarantee [] of trustworthiness." *Roberts*, 448 U.S. at 66. *United States v. Zannino* slip op. pp 7-9

In the instant case the Circuit Courts analysis rests on the erroneous assumption that the attorneys in the "Anguilo" trial were operating with a putative universality of interest with the appellant when cross-examining Smoot. Nothing could be further from the mark. The tenor of the direct examination was obviously disparaging to the appellant. However, not only was Mr. Smoot not cross-examined by an attorney for a party in interest but the most cursory look at the cross-examination of Smoot and the affidavits of counsel who cross-examined Smoot very clearly indicates that Mr. Zannino's interests were not protected. Indeed the tenor of almost the entire cross-examination was adverse to the appellant.

Although the Government's theory of prosecution was to the effect that Francesco Anguilo was accountant for the debt owed to the defendant by Smoot, Francesco Anguilo's attorney elected not to cross-examine as a matter of strategy which he determined to favor his client. (See affidavit of Eliot M. Weinstein, Esquire).

Although the Government's theory of prosecution was – and Smoot testified on direct-examination – that Donato Anguilo collected the One Hundred and Forty ($140.00) Dollars per week from Smoot *on behalf of Zannino* (Anguilo (A) Tr. Vol. 51, pp. 35, 36) there was no cross-examination by the attorney representing Donato Anguilo concerning the collection of any amount of usurious interest (A.Tr. Vol. 52 pp. 80-99 and affidavit of Attorney Robert L. Sheketoff) nor, was there any direct evidence that Donato Anguilo collected monies from Smoot on behalf of the defendant Zannino.

Attorney Paul Smith represented co-defendant Samuel Granito in the *Anguilo* trial and cross-examined Donald Smoot at some length (A. Tr. Vol. 52, p.p. 99-114) concerning Smoot's knowledge with Granito's involvement in a poker game conducted at 51 North Margin Street. There was not a

word of cross-examination by Attorney Smith concerning an extortionate extension of credit by the defendant Zannino.

Attorney Henry Katz represented co-defendant Michele Anguilo in the *Anguilo* trial and prudently decided that it was in his clients best interest to forego cross-examination of Smoot. (See affidavit of Attorney Katz).

Attorney Anthony Cardinale represented the interest of Gennaro Anguilo at the *Anguilo* trial and conducted the principle cross-examination of Mr. Smoot (A. Tr. Vol. 52, pp. 29-80). In all of that cross-examination of Mr. Zannino's name was not mentioned and there was not a word asked about the extortionate extension of credit from Zannino that Smoot had testified about on direct-examination. In the affidavit of Attorney Cardinale he makes it clear that in his judgement, his clients' interest were best served by not cross-examining Smoot on the matter concerning Mr. Zannino.

In sum, the "lengthy cross-examination" covering approximately eighty-five pages of transcript amount to zero pages of cross-examination on the very heart of Smoot's direct testimony concerning an extortionate extension of credit by Zannino.

Indeed, counsel at one point cogently stated:

> "Not at all because Your Honor has evidence that that's not the reason for it. Your Honor has the affidavits of counsel and if they . . . if Your Honor is not persuaded by affidavits then I think they ought to be brought in and let them testify as to why they felt it was not in the best interests of their clients who they were representing to cross-examine Mr. Smoot concerning the allegations of extortionate extension of credit by Mr. Zannino. That is a calculated and a proper decision made by counsel who were concerned not about Mr. Zannino but properly concerned about their own clients." (T. TR. Vol XVI, p. 14)

The Court then interposed the following:

> "and if counsel for Mr. Zannino were there he would have embarked on the cross-examination." (T. Tr. Vol. XVI p.p. 14-15)

In response defense counsel replied:

> " . . . Your Honor I suggest that it's patently obvious that any attorney who represented Mr. Zannino and did not cross-examine intensely Mr. Smoot on these elements would have been the incompetent attorney, not the attorneys who were representing other people who wanted to keep as far away as they could from those kind of averments and those types of allegations. I don't criticize other counsel. I think they did their jobs as well as they saw it to be and they did it properly. But the bottom line is that as far as any predecessor in interest so to speak of Mr. Zannino's vehement persona of these prior attorneys, that's an absolute zero, Your Honor. They simply were not – Your Honor, as their affidavits to the effect that that was not their motive. Their strategy was entirely the opposite. They kept as far away as they could from those because they did not want to keep bringing that vivid memory of Mr. Smoot's testimony up before that same jury." (T. Tr. Vol. XVI, p.p. 15-16).

Therefore, as far as the essential elements of the extortion count against the appellant are concerned, there was absolutely no cross-examination by defense counsel of Mr. Smoot. There was no cross-examination with respect to Mr. Smoot's belief that if he did not repay the appellant he would suffer physical harm as a direct result.

In *Ohio v. Roberts*, 448 U.S. 66 (1980), (the principle case relied upon by the trial Court), the Supreme Court upheld the admissibility at trial of the prior recorded testimony of a witness at a preliminary hearing. In the majority opinion written by Rehnquist, C.J. the Court concluded at page 73 " . . . since there was an adequate opportunity to cross-examine and counsel . . . availed himself of that opportunity, the transcript bore sufficient" 'indicia of reliability' and afforded the 'trier of fact a satisfactory basis for evaluating the truth of the prior statement' ". And, in footnote number 12 at page 73 the Court said "the substance of the constitutional protection is preserved to the prisoner in the

advantage he once had of seeing the witness face to face and of subjecting him to the ordeal of cross-examination".

As indicated by the above recitation of the facts in the instant case, the defendant never had a meaningful opportunity to confront and cross-examine this extremely important witness pursuant to rights guaranteed by the Fifth and Sixth Amendment.

There is a further problem which impacts the reliability and trustworthiness prongs of these tests. As related, the former testimony of Smoot was given at the "Anguilo" RICO trial. The appellant was not on trial for the overall RICO conspiracy. In fact, the "mega-trial" aspects of RICO prosecutions were deemed to be a danger to the appellant's health.

The trial Court admitted the entire unredacted accounts of Smoot's former testimony. This testimony included numerous allusions to evidence admissible only at the prior "RICO" trial, and not at Zannino's subsequent three count trial. See, Record, Smoot testimony, *infra*.

The "Anguilo" trial involved five co-defendants and references were made to a myriad of other counts and other alleged crimes. However, the Court of appeals did not properly address the procedural necessities for admission under Rule 804(b)(5).

In any situation where 804(b)(5) is invoked the party contesting admissibility must be granted a hearing and the proponent must establish relevance and materiality. Basically, the judge must determine that the evidence is probative and relevant and that there is no other evidence of greater or equivalent worth which would ameliorate the need for said former testimony.

This issue was raised both at the trial and appellate level and was never properly addressed by either Court.

If the Trial Court had properly applied the law relating to Rule 804(b)(5) then at best the Government could have used only certain portions of the Smoot transcript testimony and not the entire transcript.

In *United States v. Barrett*, 766 F.2d 609 (1st Cir. 1985), the defendant attempted to introduce excerpts from the transcript of the testimony of certain witnesses in an earlier trial

relating to an issue in the case on trial. The Trial Court excluded the testimony. The Court ruled that since the Government was not a party to the earlier proceeding, the transcript was not admissible under Rule 804(b)(1). By way of argument here, the transcript would not be admissible under Rule 804(b)(5) in that to be admissible pursuant to this section, the Court would have had to have conducted a lengthy and time consuming inquiry into the relevancy of each question and answer.

Barrett clearly holds that in the First Circuit a transcript of the testimony of a witness who is not available is only admissible if both parties were parties to the earlier action. In the instant case the appellant was not a party to the earlier trial. Further, that in order to be admissible under Section 804(b)(5), the trial court would first have to conduct a hearing as to the relevancy and admissibility of each question and answer and may not allow the transcript to be introduced in evidence in its entirety as which was done in the instant case.

In any event, the prior testimony of "Mr. Smoot" was not admissible under any Subsection of Rule 804(b).

Rule 804(b)(1) provides that former testimony may be offered against the party by who it was originally offered who had an opportunity "to develop the testimony by direct . . . or redirect examination". See, *United States v. Henry*, 448 F.Supp. 819 (D.N.J. 1978). See also, *United States v. Driscoll*, 445 F.Supp. 856 (D.N.J. 1978), *United States v. Klauber*, 611 F.2d 512, 516-7 (4th Cir. 1979)(Cites *Henry* and *Driscoll*, dictum).

Congress narrowed Rule 804(b)(1) so that the defendant against whom the testimony is now offered has to be the party in the prior proceeding. *United States v. Collins*, 478 F.2d 837, 838, rehearing denied en banc, 480 F.2d 925 (5th Cir. 1973)(citing proposed Rule 804; testimony offered against defendants at their first trial properly admitted against them; at the retrial, where the witness was unavailable, especially since they were represented by the same attorneys at both trials). Another party, no matter how closely allied in interest or motive, will not do.

In *United States v. McCall*, 740 F.2d 1331, 1342-4 (4th Cir. 1984), the court was faced with a prosecution for armed robbery of a Federal police officer. The Court of Appeals held that an affidavit prepared from a statement of the victim to a fellow officer shortly after crime, and testimony of a fellow officer as to additional oral statements of victim which were not included in affidavit were inadmissible as hearsay; moreover, neither statement was admissible as hearsay exceptions under Rules 803(24) or 804(b)(5) because the statements did not have guarantees of circumstantial trustworthiness. The Court noted that mere unavailability of the deceased witness at trial was an insufficient reason to justify admissibility of statements. In *United States v. Heyward*, 729 F.2d 297, 299 (4th Cir. 1984), a prosecution for income tax evasion, the defendant attempted to introduce a memorandum from the files of a deceased attorney. The defendant claimed his net worth had increased because of a $175,000 loan, and not from drug smuggling activities as the government claimed. The defendant attempted to introduce the memorandum under Rule 804(b)(5). The Appeals Court ruled that the Trial Court did not err in refusing to allow said memorandum into evidence as Rule 804(b)(5) was not written to be used as a broad, new hearsay exception but was to be invoked sparingly; the trial court also refused to admit memorandum on grounds of failure to provide the prosecution with adequate notice. See also, *Lloyd v. Professional Realty Service, Inc.*, 734 F.2d 1428, 1433-34 (11th Cir. 1984).

In re Japanese Electronics Products Litigation, 723 F.2d 238, 301-2 (3rd Cir. 1983) an action alleging antitrust, tariff, and antidumping violations, the Court of Appeals held that the Trial Court did not err in excluding evidence offered by plaintiffs under the residual hearsay exceptions of Rule 803(24) and 804(b)(5). There the plaintiffs failed to meet the burden of showing that the proffered statement *was more probative on point for which it was offered than any other evidence which could be procured through reasonable efforts*. (Emphasis added). See also, *United States v. Long*, 706 F.2d 1044, 1052 (9th Cir. 1983), *United States v. Castaneda-Reyes*, 703 F.2d 522 (11th Cir. 1983), *Central Freight Lines, Inc. v.*

N.L.R.B., 653 F.2d 1023 (5th Cir. 1981); and *United States v. Metz*, 608 F.2d 147 (5th Cir. 1979).

In *United States v. Fredericks*, 599 F.2d 262 (8th Cir. 1979) a prosecution for assault with a dangerous weapon, a statement by the occupant of a car at which defendant shot was properly excluded as not satisfying Rule 804(b)(5). There the Trial Court made no finding of reliability, declarant may have had motive to lie, there was sufficient probative evidence on point, and the statement contained hearsay upon hearsay. See also, *United States v. Love*, 592 F.2d 1022 (8th Cir. 1979), *Page v. Barko Hydraulics*, 673 F.2d 134 (5th Cir. 1982), *United States v. Bailey*, 581 F.2d 341, 349 n.12 (3rd Cir. 1978), *United States v. Hoyo*, 573 F.2d 111, 116 (9th Cir. 1978).

Finally in *United States v. Wingate*, 520 F.2d 309 (2nd Cir. 1975), the Court refused to admit testimony given by co-defendant at a suppression hearing which was exculpatory of defendant because the government had not had meaningful opportunity to cross examine. (See Section 804(b)(1), *supra*); the Court also found that admissibility was not mandated because the testimony lacked an "indicia of reliability". It was self serving rather than against penal interest, and there was no corroboration as to the accuracy of the testimony.

It would appear that while there is a division in the Circuits, this case is unique in that, while there was cross-examination, it was not by or on behalf of the defendant. (See infra)

Finally, it was error to have included the uncross-examined record of Smoots testimony.

There were numerous recitations of hearsay upon hearsay, and evidence which would have been admissible only during the "RICO" trial of the severed co-defendants.

The hostile nature or the evasive nature of the co-defendants towards this appellant further exacerbated the problem of admissibility.

There can be no doubt that the appellant's lawyer had absolutely no opportunity to cross-examine Donald Smoot. It is uncontroverted that Donald Smoot was the key witness

against the appellant. It was Smoot's intent which really created the body of the alleged crime. The problem with the governments' case was primarily because Smoot's testimony was so equivocal. A reading of this former testimony demonstrates that the government had labored mightily to extract damaging statements from him at all. See Vol. 51 (Angiulo Trial) pp 57-96. Zannino Trial (Vol. XXIV pp 5-6, pp 8-35) and *infra*.

Thus, the need for effective cross-examination on behalf of the appellant was signal. This is not a situation analogous to the cases where grand jury testimony is presented. *Bourjaily v. United States*, 483 U.S. 171 (1987), *United States v. Guinan*, 836 F.2d 350 (7th Cir.), *cert. denied*, 108 S. Ct. 2871 (1988), *United States v. Marchini*, 797 F.2d 759 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987).

Here the appellant was "blitzed" by the actions of the co-defendants' counsel and the prosecution. He was faced with the most equivocal testimony of a *victim* and he had no adequate way to challenge that evidence.

The ruling in this case violated the statutory evidentiary scheme of F.R.E. 804(b)(5) and also the appellants constitutional rights under the Fifth and Sixth Amendments.

III. THE APPELLATE COURT ERRED IN AFFIRMING THE DENIAL OF APPELLANT'S MOTION TO SUPPRESS ELECTRONIC SURVEILLANCE.

In its decision, the Circuit Court addressed the issue raised as to the Motion to Suppress the fruits of an electronic surveillance at 51 North Margin Street, (See, Issue II, p. 10, Appellant's Brief, p. 10). The Court stated:

> Zannino also argues that the evidence obtained at North Margin St. should be suppressed because the order authorizing electronic surveillance was not supported by probable cause. He did not raise this claim below and has, therefore, waived it for purposes of this appeal. See, *United States v. Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987); *United States v. Argentine*, 814 F.2d 783, 791 (1st Cir. 1987). In any event, the argument has no real basis.

This finding is inopposite with the facts. The appellant *did not* waive this issue and in fact, the issue was raised by

pre-trial motion. There was a hearing before the District Court Judge and a denial of the motion.

The decision of the Circuit that "the motion was not raised prior to trial, is not in accordance with the record on appeal nor the facts. Such a ruling has deprived the appellant of due process of law and is a direct violation of the IV, V, and VI Amendments to the Constitution of the United States.

The finding of the Court in an off-hand manner in a footnote to the decision that "the argument has no real basis" does not direct itself to the serious violation of Title 18 U.S.C., Sec. 2518(4)(a), (b), (c) and (e).

In the instant case, most of these provisions of Title III were completely ignored, both in the Government's application and the Court's entry of an order expanding the duration of authorized eavesdropping at 51 North Margin Street. Far from establishing probable cause, the affidavit filed by the Government in support of its motion of April 6, 1981 set forth only special FBI Agenct Shaun Rafferty's unsubstantiated *belief* that conversation encompassing criminal offenses "*could* have occurred" after 7:00 a.m. (emphasis *supplied*). While the Government's application of April specified the time for which surveillance authorization was sought (from 7:00 a.m. until all of the targeted subjects had left the premises), it failed to indicate why such additional interceptions were necessary or whether other investigative means had been or could be used in an effort to obtain the equivalent evidence.

Moreover, in his affidavit, Agent Rafferty expressed an interest in overhearing conversations regarding certain offenses for which Title III authorization had not and could not be obtained. The affidavit discusses past and anticipated evidence concerning murder and conspiracy to murder, yet both of these offenses are outside the scope of Title III. Raferty also indicated a desire to learn more about the structure of an alleged criminal organization which was later characterized by the Government as an "enterprise" under the RICO statute (18 U.S.C. Section 1961 *et seq.*). Yet no authorization to intercept conversations regarding RICO offenses had been obtained as of April 6, 1981.

The order entered by the Court purporting to authorize this expanded surveillance was not and could not have been predicated upon a finding of probable cause. Indeed, the Court offered no reasons at all to justify authorizing the interception of additional communications. The order entered by the court contained neither a statement regarding the need to minimize the unauthorized overhearings nor a finding that the additional surveillance sought was necessary to accomplish an legitimate Governmental objective.

Given its flagrant non-compliance with statutory requirements in obtaining authorization to expand its surveillance at 51 North Margin Street, the Government is likely to argue that it did not have to satisfy any of the provisions of Title III since it sought only to "amend" an order authorizing electronic surveillance at the same location, entered on March 27, 1981. Presumably, the argument would be that that showings made by the Government and the finding made by the Court in the context of that prior order somehow carried over to the extension of authorized surveillance beyond the 7:00 a.m. deadline, rendering any new showing and findings unnecessary. Since this was merely authorization to intercept, the requirements of the statute do not apply.

This argument, while superficially appealing, must fail. Whatever the Government chose to call its attempt to expand the scope of interception at 51 North Margin Street, it was in fact, a request to conduct additional searches and seizures of conversations. Without specific authorization, interception of communications after 7:00 a.m. would have been unlawful. As in the case of a formal "extension" under the statute, any such request to enlarge the Government's authorized intrusion must be based upon a showing of probable cause, necessity, and all of the other prerequisites set forth in Section 2518. Similarly, no such additional interceptions can be authorized without the specific judicial determinations embodied in the statute.

Whether such an attempt to conduct additional surveillance is denominated an "application", an "extension", or an "amendment" makes no difference. Each and every invasion of privacy through electronic eavesdropping must satisfy the

procedural safeguards of the statute. Here, the process resulting in the interception of communications at 51 North Margin Street after 7:00 a.m., pursuant to the Court order entered on April 7, 1981, fell far short of the mark.

While "technical" violations of Title III do not necessarily warrant suppression, *United States v. Donovan*, 429 U.S. 413, 433 (1977), such relief was clearly required under the circumstances of this case.

Even if Title III did not exist, the interception of conversation at 51 North Margin Street based upon the Government's application of April 6th and the resulting Court Order would have been unlawful. It is a fundamental requirement of the Fourth Amendment that a search warrant specify with particularity the item(s) which may be seized. *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *Marron v. United States*, 275 U.S. 192, 196 (1927). The degree of intrusion permitted in the name of law enforcement is limited to the extent of a judicial finding of probable cause. *United States v. Ford*, 553 F.2d 146, 167-68, n.62 (D.C. Cir. 1977). The fact that a search had been authorized does not diminish the significance of a constitutional violation should the search exceed authorized bounds. See, *Chimel v. California*, 395 U.S. 752, 766, n.12 (1969). The same rule obviously applies to electronic surveillance. If the officers conducting the bugging deliberately eavesdrop on matters outside the scope of the warrant or authorization order, the search is unlawful.

As explicated by a plurality of the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S 443, 467-70 (1971), the plain view doctrine requires that the discovery of such evidence be "inadvertant". Thus, "if the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of warrants . . . particularly describing . . . [the] things to be seized". *Id.* at 470. The formulation of the plain view doctrine set forth in *Coolidge*, including the requirement of inadvertence, has been adopted by the Court of Appeals for the First Circuit. *United States v. Irizarry*, 673 F.2d 554, 560 (1st Cir. 1982).

In sum, the Government's interception of communications at 51 North Margin Street pursuant to a Court Order entered on April 7, 1981, failed both tests. While the Government's request which led to that Order was presented as a motion to "amend" a prior Order authorizing surveillance at that address, the effect of the Order was to expand the scope of authorized interception and permit the Government to seize additional conversations outside the scope of that prior Order. Neither the Government's application nor the Court Order authorizing this additional invasion of privacy satisfied the specific procedural requirements of Title III. Moreover, the Government did not allege and the Court did not find probable cause to justify the additional surveillance. Thus, the interception of appellant's conversations under the April 7th Order did not comport with the fundamental requirements of the Fourth Amendment. Whatever the Government choose to call the scheme to broaden its snooping at 51 North Margin Street, that label cannot purge the events themselves of their inherent illegality. Since the statute and the Constitution were grossly violated, the fruits of the surveillance conducted pursuant to the April 7th Order should have been suppressed by the Trial Court.

IV. THE APPELLATE COURT ERRED BY IMPROPERLY UPHOLDING THE ADMISSION OF "BAD ACT" EVIDENCE ON THE PART OF OTHER INDIVIDUALS AND IMPUTING THE SAME TO THE APPELLANT.

The Court allowed evidence that was totally improper, highly prejudicial, and entirely irrelevant to this trial.

The Court admitted several pieces of "Bad Act" evidence imputed to people who were supposed friends of the appellant. This evidence was proffered soley to show the appellant in a manipulative and nefarious light.

Basically, the evidence objected to involved:

1) Testimony by alleged extortion victim Paul Alexander by Carmen Tortora and Thomas Peachie.

2) The appellants taped statements regarding his putative friendship with Carmen Tortora.

Mr. Alexander testified that he began borrowing money from an individual named "Thomas Peachie" at an interest rate of "six to five".

Mr. Alexander further testified that at some point he, "Peachie", and Carmen Tortora visited the appellants house in order to clean out the basement immediately following the "Blizzard of 78."

The witness further testified that he had never before met the appellant. During the course of this visit, the witness stated that Mr. Peachie and Mr. Tortora both went upstairs to speak with the appellant at separate intervals. After this visit Tortora, Peachie and the witness drove bach to Dorchester in Tortora's automobile. The witness then gave his rendition of what was said on the turn trip:

"Q. Now, on the ride on the way home, Mr. Alexander, did you overhear a conversation between Thomas Peachie and Carmen Tortora?

A. Yes, I did.

Q. Would you please tell the jury to the best of your memory what that conversation consisted of, what Mr. Tortora said to Mr. Peachie and what Mr. Peachie said to Mr. Tortora?

MR. BALLIRO: My objection as I have indicated.

THE COURT: It's recorded.

A. Tommy Peachie asked if he got the money that he wanted. And Carmen Tortora answered yes, I did. And then he stated, "What else did he have to say". Carmen Tortora said nothing. And then Tommy Peachie turned around and said, "well, he's always yelling at me but I don't pay to much attention because I have $80,000 of his money on the street".

Q. Now, this conversation occurred in March of '78; is that correct, Mr. Alexander?

A. Yes."

T. Tr. Vol. XVI, pp. 73-74.

Subsequently, this witness continued to borrow money from Thomas Peachie until Mr. Peachie's death in December of 1978. At that time Mr. Alexander began borrowing money from Carmen Tortora directly. At one point the witness alleged that Tortora threatened him in order to obtain repayment for the loans. Specifically, Tortora made violent threats against Mr. Alexander's life if he did not pay the sum of two or three hundred dollars. (See T. Tr. Vol. XXIV, pp. 30-42)

The Court improperly allowed the evidence of "bad acts" committed by Thomas Peachie and Carman Tortora, as evidence to be imputed to the appellant. The theory for use of this evidence was that the appellant supervised the iniquitous activities of Peachie and Tortora.

That "bad act" evidence – evidence which was also rife with hearsay, – was preferred to the jury to demonstrate the appellants intent in making the charged $14,000 loan to Donald Smoot (T. Tr. Vol. XVI pp. 41-44).

The next block of disparaging evidence erroneously admitted against the appellant consisted of tape recordings made at 98 Prince Street when the appellant brought Tortora in to speak to the Angiulo Brothers for the first time.

The tapes appear to indicate the appellant made statements such as, "You're my guy, just remember that." "Don't ever forget that." "I wish I had three more like you." (T. Tr. Vol. XVI, pp. 39-44).

Later on in the tapes, the appellant speaks about Tortora's recent criminal case in regard to the tape recording. The appellant is alleged to say things such as, "Why do you think I told him to cop out" "That's part of the game." "He is 33 years old." "He's a big boy." "He's got big shoulders." "He'll go do his (expletive) time." (T. Tr. Vol. XVI pp. 41-44).

After Tortora has gone to prison in regard to that conviction, the government alleges that the appellant had a conversation regarding statements he made to Tortora's wife. There he intimates that Tortora's wife wants a television for her husband. The appellant states that we would do so instantly, and gave her one thousand dollars. (T. Tr. Vol. XVI pp. 41-44).

Finally the government offered an April 3, 1981 conversation in which the appellant alleges that Carmen Tortora is proposed, although the reason for this proposal is not revealed.

Obviously, these activities of Tortora and Peachie vis-a-vis Alexander took place in late 1979 to spring of 1980, far removed from the appellants alleged activities in the instant case – spring of 1981.

Furthermore, the evidence proffered by the government are incidents of bad acts performed by Peachie and Tortora who were not on trial, or coconspirators. The bad acts of those individuals were not foundationally tied to the appellant. The evidence of Tortora and Peachie's extortion of Mr. Alexander is extremely tenuous when applied to the allegation in this case – the extortionate credit extention to Donald Smoot. There is absolutely no foundation with which to tie the putative extortionate credit allegations between Tortora, Peachie, and Alexander to this appellant. See *United States v. Lynn* 856 F.2d 430 (1st Cir. 1988).

Here, as related defense counsel objected rather strenuously to the admission of this bad act/other crime evidence as being irrelevant, remote, total hearsay, and highly prejudicial. Despite extended argument by defense counsel and reply by the government, the trial Court simply allowed the evidence to come before the jury (T.Tr. XVI pp. 40-44).

In response to this argument the First Circuit ruled as follows:

> "Zannino also complains about the jury having heard evidence of an earlier extortionate scheme which he allegedly operated in concert with Thomas Peachie and Carmen Tortora. The complaint is jejune. The jury was entitled to find, from appellant's own mouth, that he was in league with Peachie and Tortora. The earlier scheme was reasonably proximate in time to the charged extortion. And we, like the District Court, believe that the material was competent, under Fed. R. Evid. 404(b), to show Zannino's criminal intent and extortionate understanding vis-a-vis Smoot loan." *Zannino, id.*, slip op. pp. 36-37.

The appellant avers that the Circuit Court's ruling was against the facts as argued above and against the law as interpreted by other courts.

A trial judge acts within his sound discretion in admitting evidence of prior wrongful acts when, (1) the *evidence is relevant to an issue in question other than that of the character of the defendant*, (2) *there is clear and convincing evidence that the defendant committed the prior acts*, and (3) the *potential unfair prejudice* of the evidence does not substantially out weigh its probative value. See, *United States v. Huddleston*, 485 U.S. 681 (1988); *United States v. Young*, 618 F.2d 1281, 1289 (8th Cir. 1980), *United States v. Scholle*, 553 F.2d 1109, 1121 (8th Cir. 1977). Broad discretion is afforded the trial judge in deciding whether to admit wrongful act evidence and his decision will not be over turned without a clear showing that the requirements have not been met. *United States v. Robinson*, 700 F.2d 205, 214 (5th Cir. 1983), *United States v. Jardan*, 552 F.2d 216, 219 (8th Cir. 1977), *United States v. Pirolli*, 673 F.2d 1200, 1203 (11th Cir. 1982).

Here the admitted evidence was remote in time, irrelevant to the issue, and extremely tenuous in its collateral connection to the appellant. The prejudicial value of this evidence was extremely high. Obviously, there is absolutely no nexus between the appellant and the activities of Peachie and Tortora. Even the tape recordings only indicate that the appellant had a friendship with Tortora, and wished to help him out in his time of misfortune.

It is very likely that Peachie and Tortora were operating their own activities. It is clear that the appellant was not present when Peachie and Tortora made the damaging statements, and there is no clear and convincing evidence that the appellant had anything to do with the "Alexander extortion". The government was improperly "piling" inference upon inference, and proposing a conclusion which was susceptible to many other conclusions. See, *State v. Alexander*, 471 A.2d 216 (R.I. 1984), see also *United States v. Ochoa*, 609 F.2d 198 (5th Cir. 1980), *United States v. Vigo*, 435 F.2d 1347, 1351 (5th Cir. 1971) (wherein the Court states the precedent that the admission of bad conduct of relatives or friends to be

error), *United States v. Labarbera*, 581 F.2d 107, 109 (5th Cir. 1978). This was a highly prejudicial attempt to taint the defendant's character through guilt by association.

Therefore, the admission of this extraneous evidence was extremely dangerous and prejudicial and should have been proscribed as violative of the appellant's Sixth Amendment rights.

V. THE APPELLATE COURT ERRED IN DENYING THE APPELLANT'S REQUEST TO INCORPORATE ARGUMENTS RELATED TO PRE-TRIAL MOTIONS.

The appellant, in it's brief (p.73) adopted all of the arguments made on behalf of the *original* co-defendants, Gennaro, Donato and Michele Anguilo and Samuel Granito.

The Circuit Court ruled:

> In a cursory reference in his appellate brief, Zannino seeks to "adopt all of the arguments made on behalf of co-defendants Gennaro, Donato, and Michele Anguilo [sic], and co-defendant Samuel Granito, as each argument applies to this appellant". We summarily reject this ploy. The co-defendants were tried apart from Zannino, on a somewhat different array of charges. They have raised a series of issues which relate to their separate trial in ways not readily transferrable to Zannino's circumstances. (Decision p. 37).

This ruling is not in accordance with the procedure established by the Trial Court as to pre-trial motions prior to severance. Prior to appellant Zannino's severance *all* pre-trial motions, by Order of the Trial Judge, were to be *consolidated* as one. In accordance with this Order, all motions and memoranda were filed as consolidated. The appeal on these, in order to avoid redundancy of argument by all other defendants, was consolidated. Appellant for the same reason should have been allowed to incorporate said motions and rulings.

Further, in an attempt to brief these issues the appellant had asked to file a 120 (one hundred-twenty) page brief. This request was *rejected* by the Circuit Court and the Court

ordered the appellant's brief reduced to 75 (seventy-five) pages. The appellant in compliance with this Order pared down the brief.

Now the very same Circuit reprimands counsel and refuses to allow incorporation by stating:

> "Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." (Decision p.38).

This "catch 22" ruling, in effect, deprives appellant of appellate review of pre-trial, pre-severance issues.

CONCLUSION

Petitioner requests that this Petition be granted.

Respectfully submitted,

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March, 1990

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1221

UNITED STATES OF AMERICA,

Appellee,

v.

ILARIO M. A. ZANNINO,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. David S. Nelson, *U.S. District Judge*]

Before

Bownes, Breyer and Selya, *Circuit Judges*.

Joseph J. Balliro, with whom *Edward J. Romano* was on brief for appellant.

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JANUARY 10, 1990

SELYA, *Circuit Judge*. In 1983, defendant-appellant Ilario M.A. Zannino, allegedly a predominant figure in the so-called "Patriarca Family" of La Cosa Nostra, was

indicted by a federal grand jury. The indictment charged Zannino and several codefendants with conspiring to participate in an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), (d), and with a number of racketeering, loansharking, and gambling violations. The listed predicate acts included two murders and four conspiracies to commit murder. Zannino stood trial after the others,[1] and then, on only three of the original eight counts directed against him. Having been found guilty before a jury and sentenced to a 30-year prison term, he prosecutes this appeal. We affirm.

I. BACKGROUND

Zannino's indictment grew out of the judicially sanctioned electronic surveillance of apartments at 98 Prince Street and 51 North Margin Street in Boston's North End.[2]

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[1] Zannino's codefendants included the five Angiulo brothers (Gennaro, Francesco, Nicolo, Donato, and Michele), and Samuel Granito. Nicolo Angiulo never stood trial; he is now dead. Most of the other codefendants were convicted for their involvement in the affairs of the enterprise (the Patriarca Family) and on various subsidiary counts. Michele Angiulo was acquitted on the racketeering charges, but was convicted of participating in one of the enterprise's illegal gambling businesses. Zannino's appeal was consolidated with the codefendants' appeals for purposes of oral argument only (the briefing being entirely separate).

[2] The surveillance, which provided the basis for numerous prosecutions, has been much chronicled in opinions of this

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Hidden microphones recorded numerous conversations among various persons, including Zannino and his codefendants, during the period January-May 1981. The FBI monitored the conversations and, in addition, photographed persons entering and leaving the premises. We summarize certain critical data, taking the evidence as the jury could permissibly have found it, viewing the record in the light most congenial to the prosecution, and drawing all reasonable inferences in the government's favor. *See United States v. Ingraham*, 832 F.2d 229, 230 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1738 (1988); *United States v. Cintolo*, 818 F.2d 980, 983 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987).

The evidence indicated that the surveilled premises were used as the headquarters for the operation of prosperous, but illegal, gambling and loansharking businesses. Gennaro Angiulo was at the apex of the criminal pyramid and, as such, was ultimately responsible for the delegation of tasks to others.[3] Zannino was a "Capo Regime" – loosely, a captain – in the Patriarca Family, serving under Angiulo.

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court. *See, e.g., United States v. Angiulo*, 847 F.2d 956, 960-62 (1st Cir.), *cert. denied*, 109 S. Ct. 314 (1983); *United States v. Cintolo*, 818 F.2d 980, 983-89, 1002-03 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987). We also note that, prior to trial, Zannino's case itself occasioned two appellate opinions which afford some background as to the indictment's travel. *See United States v. Zannino*, 798 F.2d 544 (1st Cir. 1986) (per curiam); *United States v. Zannino*, 761 F.2d 52 (1st Cir. 1985).

[3] Henceforth, we shall refer to Gennaro Angiulo as "Angiulo," using first names to describe his brothers.

From at least the fall of 1980 to late spring of 1981, high stakes poker games were held at North Margin St. Photographic surveillance of the building's outside entrance revealed a regular flow of players coming and going. Intercepted conversations disclosed that the poker games were "owned" by a quinquevirate comprised of Zannino, Angiulo, Granito, Ralph Lamattina, and Nick Giso. Francesco Angiulo served as the operation's accountant. John Cincotti managed the staff, collected the dealers' tips, arranged credit for the gamblers, and collected debts. Zannino was the chief operating officer of the venture, supervising Cincotti, determining player eligibility, and overseeing the debt collection function. Donald Smoot was a poker player to whom the house frequently extended credit.

Zannino was also deeply involved with Angiulo in a loansharking operation.[4] They were often overheard discussing aspects of the business. Among other things, the loansharks furnished venture capital to gamblers. By early 1981, Smoot owed Zannino $14,000. Smoot made interest payments on this debt at the rate of one percent per week ($140), paying the money to Zannino, Cincotti, or Donato Angiulo. When Zannino "assigned" $2,000 of the principal to Dominic Isabella, Smoot began to make hebdomadal interest payments to Isabella at twice the rate. Smoot as well aware that, considering the circumstances,

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[4] "Loansharking," sometimes called "shylocking," is a term of criminal art which may roughly be defined as the unlawful lending of money at usurious rates of interest, repayment being encouraged by the use (or threatened use) of unorthodox, often violent, collection measures.

he could be threatened with physical harm or violence if he failed to pay his indebtedness to appellant.

The evidence at trial also implicated Zannino in a barbooth gambling business[5] at the Demosthenes Democratic Social Club in Lowell, Massachusetts during 1980-81. Angiulo oversaw the barbooth operation, with Francesco Angiulo as the accountant, Peter Vulgaropoulus as the manager, and Vincent Roberto (a/k/a "Fat Vinnie") as an assistant manager. Zannino had a financial interest. Numerous conversations were intercepted in which Zannino, Angiulo, and others discussed the barbooth gambling business, including their stake in it, the profits collected, and the house's extension of credit to bettors. Additional evidence was garnered during a warranted search of the Lowell premises in late 1981.

As previously noted, appellant's case was severed from his codefendants. He was tried on three of the counts against him: two counts of running illegal gambling businesses in violation of 18 U.S.C. § 1985 (relating, respectively, to poker games and barbooth gambling), and a third accusing him of making an extortionate extension of credit to Smoot in violation of 18 U.S.C. § 892(a). Appellant was convicted on all three counts.

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[5] Barbooth is a fast paced dice game in which one wins or loses by shooting certain combinations of numbers. The house provides the dice, the situs, and the croupier. Typically, 15 to 35 people bet on whether the shooter will throw a winning combination. The house does not bet its own money, but takes a percentage, called a "rake," typically 2½% of each bet.

In this appeal, he assigns myriad errors. There are four major issues: the use of Smoot's testimony; the admissibility of the tape-recorded conversations; sufficiency of the evidence; and defendant's flagship claim – that his ill health required more solicitous treatment than was received. We address these in the indicated order, touch briefly upon a few other arguments, and summarily reject the rest.

II. A DEAD MAN'S TALE

Smoot, a cooperating government witness, had been placed in the witness protection program and testified at the trial of Zannino's codefendants. [On that occasion, he was vigorously cross-examined by three different defense counsel.] He died prior to appellant's trial. Appellant mounts a two-pronged challenge to the judge's ruling that Smoot's earlier testimony could be introduced.

A. The Confrontation Clause.

Zannino first contends that reading Smoot's previous testimony to his jury violated the Confrontation Clause, U.S. Const. Amend. VI. To be sure, the Constitution prohibits the random admission into evidence of an unavailable declarant's hearsay statements. Yet, we know on the best authority that such out-of-court statements may nonetheless be admitted at a criminal trial in a variety of circumstances. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987) (coconspirator statements); *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970) (statement against penal interest); *see also United States v. Seeley*, No. 88-1431, slip op. at 4 (1st Cir. Dec. 15, 1989); *United States v. Fields*, 871

F.2d 188, 192-93 (1st Cir.), *cert. denied*, 110 S. Ct. 369 192-93 (1989); *United States v. Dunn*, 758 F.2d 30, 39 (1st Cir. 1985).

The touchstone is trustworthiness. When a declarant's unavailability has been shown, the Confrontation Clause may be satisfied if the declaration bears adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Put in constitutional context, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement' ". *Dutton*, 400 U.S. at 89 (quoting *California v. Green*, 399 U.S. 149, 161 (1970)). Thus, the requirements of the Confrontation Clause regarding the admission of hearsay evidence are met whenever the evidence falls within a firmly rooted exception to the hearsay principle. *See Bourjaily*, 483 U.S. at 182-83; *Roberts*, 448 U.S. at 66. As we recently wrote, "to the extent that a traditional hearsay exception has sufficiently long and sturdy roots, a determination that the exception applies obviates the need for a separate assessment of the indicia of reliability which may or may not attend the evidence." *Puleio v. Vose*, 830 F.2d 1197, 1205 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1297 (1988).

While a firmly rooted hearsay exception doubtless exists for former testimony given by a declarant who dies, or becomes unavailable, before the trial at issue, *see Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972); *California v. Green*, 399 U.S. at 165-66, that exception is usually thought to hinge on defendant's counsel having had "complete and adequate opportunity to cross-examine" on the earlier occasion. *Green*, 399 U.S. at 165. Here,

Zannino's trial had been severed and his counsel, therefore, had no chance to cross-question Smoot when the main racketeering trial occurred. We therefore assume, as appellant urges, but do not decide, that no such exception applies.

The presence of such a categorical exception is not, however, a *sine qua non* to admissibility, but merely a way of easing the introduction of an unavailable declarant's statements. Where, as here, no such exception is claimed, the court may still look at the totality of the circumstances to see if adequate indicia of reliability attend the evidence. *See Bourjaily*, 483 U.S. at 179; *Roberts*, 448 U.S. at 66; *Dutton*, 400 U.S. at 89; *Dunn*, 758 F.2d at 39. To that end, we independently examine the circumstances surrounding Smoot's testimony in order to ascertain whether it passes sixth amendment muster.

Before embarking upon this voyage, we first address, and reject, appellant's asseveration that, absent the catharsis of cross-examination, an unavailable declarant's earlier testimony can never be reliable enough to allay constitutional concerns. While the point seems to be an open one in this circuit, our sister circuits have uniformly admitted uncrossexamined grand jury testimony into evidence at a subsequent trial where the declarant is no longer available and the requisite indicia of reliability exist. *See, e.g., United States v. Guinan*, 836 F.2d 350, 358 (7th Cir.), *cert. denied*, 108 S. Ct. 2871 (1988); *United States v. Marchini*, 797 F.2d 759, 764-65 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *United States v. Walker*, 696 F.2d 277, 280-81 (4th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983); *United States v. Barlow*, 693 F.2d 954, 963-65 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); *United States v.*

Carlson, 547 F.2d 1346, 1355-60 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). Although the practice seems impeccable, we need not go quite so far today.

In this case, the reliability index is higher. Before the grand jury, testimony is not cross-examined *at all*; here, though Zannino's counsel never had an opportunity to question Smoot, the declarant was vetted at the earlier trial by defense attorneys who shared appellant's interest in denigrating Smoot's credibility. The case before us is, therefore, a much stronger one for admissibility: the functional equivalent of cross-examination by the defendant was present here, bolstering the inherent reliability of the testimony. *See Barker v. Morris*, 761 F.2d 1396, 1402-03 (9th Cir. 1985) (approving admission of testimony of deceased witness given at preliminary hearing and used at trial against defendant who was not represented at the preliminary hearing), *cert. denied*, 474 U.S. 1063 (1986). Thus, Smoot's sworn statements at the Angiulos' trial, as opposed to, say, grand jury testimony, offered a "particularized guarantee[ ] of trustworthiness." *Roberts*, 448 U.S. at 66.

We rule that the absence of cross-examination on appellant's behalf does not automatically require rejection of the former testimony of an unavailable declarant in a criminal case. Cross-examination, while it remains an important method of testing for the truth, is not the exclusive method by which the imprimatur of reliability can be conferred upon hearsay evidence. We do not believe it to be constitutionally required as a condition to the introduction of former testimony.

We now move to other indicia of reliability. Having carefully reviewed the testimony and the texture of the two trials, we agree with the district court that Smoot's former testimony contained ample trappings of dependability. The testimony was given under oath. It was not implausible. It was solidly corroborated: to cite but a few examples, Francesco and Nicolo Angiulo were overheard discussing the $14,000 that Smoot owed to Zannino; subsequently, Zannino and Angiulo were heard debating what procedure might be appropriate were Smoot to default; and, on a later tape, a group of persons (including Zannino, Angiulo, and Isabella) rehashed the status of Smoot's debt and the anticipated arrangements for repayment. Such strong corroboration obviously enhances the testimony's reliability. *See, e.g., United States v. Workman*, 860 F.2d 140, 144-46 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1529 (1989); *Guinan*, 836 F.2d at 356-58; *Marchini*, 797 F.2d at 764; *Barker*, 761 F.2d at 1402. It is likewise relevant that Smoot testified about matters within his personal knowledge, *see, e.g., Marchini*, 797 F.2d at 765; that he appeared without the protection of immunity, *see, e.g., Guinan*, 836 F.2d at 358; and that no significant extrinsic evidence impeached his version of events.

There is no need to paint the lily. Smoot's former testimony, though not subject to cross-examination on appellant's behalf, bore such staunch hallmarks of reliability that its admission was completely compatible with the guarantees of the sixth amendment.

B. Rule 804(b)(5).

Our ruling that there was no constitutional bar to use of this evidence does not end our inquiry into it. In a

criminal trial, it is never enough that certain evidence is not prohibited; the proponent must be able to show, affirmatively, that it is permitted. In this case, the nonconstitutional dispute as to admissibility focuses on Fed. R. Evid. 804(b)(5). The rule provides that statements made by an unavailable declarant – and few declarants are more "unavailable" than dead men – may nonetheless be introduced if they are accompanied by "circumstantial guarantees of trustworthiness" *and* if the court determines that:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Fed. R. Evid. 804(b)(5). We review the district court's application of the rule under an abuse-of-discretion standard. *See United States v. Rodriguez*, 706 F.2d 31, 41 (2d Cir. 1983); *Carlson*, 547 F.2d at 1354-55. Applying this yardstick, we find that the court acted within its discretion in deciding that Smoot's testimony satisfied the rule's requirements.

As to "circumstantial guarantees of trustworthiness," nothing need be said. We have already found that the statements were accompanied by meaningful indicia of reliability. *See supra* Part II(A). In this instance, those findings are dispositive of the "guarantees of trustworthiness" prong. Whether or not the two standards are always the same is a question we need not answer.

Turning to the rule's remaining requirements, we believe that the evidence's materiality is obvious. The record plainly indicates that Angiulo headed a loansharking business which involved Zannino, Donato Angiulo, and others, and that these individuals acted together to collect the $14,000 debt. The declarant's former testimony dealt with matters such as the circumstances surrounding the extension of credit, its terms and payment history, and the borrower's understanding that physical harm might result from nonpayment. The testimony was painfully material. It was also highly probative. Smoot had personal knowledge of the matters at issue, unique in some respects. He alone could recount his understanding of the foreseen consequences of default. With Smoot dead, his personal knowledge could best be tapped by resort to his earlier testimony. However heroic the efforts that it might undertake, the government could not be expected to procure evidence with a greater, or equivalent, probative worth. The absence of cross-examination was not fatal; nothing on the face of the rule, or in its spirit, prohibits the admission of previous testimony untested by cross-examination.[6]

A dispassionate appraisal of the circumstances convinces us, as it did the lower court, that allowing the jury to hear Smoot's former testimony was consonant with both the interests of justice and the Federal Rules' general

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[6] We note with approval that, before Smoot's testimony was read, the district court gave a clear, firm prophylactic instruction highlighting appellant's lack of any opportunity to cross-examine.

purposes. In our estimation, the panoply of factors present in this case fully satisfied the strictures of Rule 804(b)(5). *See, e.g., Marchini*, 797 F.2d at 764-65; *Barlow*, 693 F.2d at 961-62; *United States v. Boullahanis*, 677 F.2d 586, 588-89 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982); *United States v. Garner*, 574 F.2d 1141, 1144-46 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); *United States v. Ward*, 552 F.2d 1080, 1082-83 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977). We discern no abuse of discretion in the district court's application of Fed. R. Evid. 804(b)(5) or in its admission of the challenged testimony.

III. ELECTRONIC SURVEILLANCE EVIDENCE

Zannino attacks the district court's denial of his motion to suppress the voluminous evidence obtained through electronic surveillance. He claims that suppression is warranted because the government, in its affidavit supporting the application for judicial permission to carry out the bugging of the premises, failed to reveal previous wiretap applications.

It is true that, when the government asked the federal district court for authorization to proceed in January 1981, the moving papers did not disclose the existence of five earlier applications by Massachusetts police (circa 1978) seeking to make appellant the target of electronic eavesdropping. By the same token, the record is barren of any direct evidence that the federal investigators knew of these earlier state efforts. Appellant contends, however, that the circumstances leading to this arrest in 1978 were so well known in the Boston area that, in the present investigation, federal authorities must have known that

he had been the subject of court-ordered electronic surveillance some years previously. Even if the individuals responsible for conducting the current investigation did not have actual knowledge of the prior interceptions, Zannino argues, other members of the Federal Bureau of Investigation (FBI) and Strike Force unquestionably had such knowledge. The failure to make reasonable inquiry of knowledgeable persons in those agencies, he concludes, was so reckless an omission as to invalidate the surveillance which led to the instant indictment.

We started with the applicable statute, which requires that each application for electronic surveillance include:

> a full and complete statement of the facts concerning all previous applications known to the individuals authorizing and making the application, made to any judge for authorization [of electronic surveillance] involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application.

18 U.S.C. § 2518(1)(e). The statute's plain language is, we think, the best guide to its meaning. Giving the language its ordinary purport, the only potentially disqualifying knowledge is that of "the individuals authorizing and making the application." *Id.* That is how the statute reads and how it has generally been interpreted. *See, e.g., United States v. O'Neill*, 497 F.2d 1020, 1025-26 (6th Cir. 1974) (complete compliance with § 2518(1)(e) achieved where application disclosed all previous applications known to individual actors, notwithstanding that other applications existed); *United States v. Harvey*, 560 F. Supp. 1040, 1073

(S.D. Fla. 1982) (similar), *aff'd*, 789 F.2d 1492 (11th Cir.), *cert. denied*, 479 U.S. 854 (1986).

In this case, the district court held a pretrial suppression hearing. Collins, the Strike Force attorney who applied for the surveillance warrants, and the affiants in connection therewith (FBI agents Quinn and Rafferty), all testified that, at the time, they were unaware of the local authorities' 1978 applications. The district court credited this testimony. We review this finding only for clear error – and can discern none. That, it would seem, should end the matter: an investigator cannot be expected to disclose something he or she does not know. Section 2518(1)(e) requires government agents to be forthcoming, not omniscient.

Undeterred, appellant urges that, even if the agents were uninformed, they were chargeable with constructive knowledge. The short answer to this plaint is that the statute requires actual, not constructive, knowledge. The slightly longer answer is that, even if the government may not "recklessly remain ignorant of previous applications," *United States v. Sullivan*, 586 F. Supp. 1314, 1318 (D. Mass. 1984) – an idea we leave for another day – there was no evidence of willful blindness here. At best, appellant showed the possibility of a negligent, but unintentional, violation of 18 U.S.C. § 2518(1)(e): the agents testified that they conduct a thorough inspection of FBI files to determine whether there were any prior applications, for electronic surveillance directed at Zannino or other proposed targets, and came up empty. If they were careless, and erred, it profits appellant naught. Mere negligence would not warrant suppression of the evidence. *See United States v. Abramson*, 553 F.2d 1164, 1169-70 (8th

Cir.), *ceri. denied*, 433 U.S. 911 (1977); *see also United States v. Giordano*, 416 U.S. 505, 527 (1974) (indicating that suppression of evidence would be justified only if electronic surveillance violation contravened "those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly called for the employment of this extraordinary investigative device"); *cf. United States v. Mora*, 821 F.2d 860, 870 (1st Cir. 1987) (evidence obtained through wiretaps was admissible at defendants' trial even though tapes were not judicially sealed in strict accordance with 18 U.S.C. § 2518(8)(a)).

Because the record amply supports the district court's finding that the responsible government officials were unaware, after a good faith inquiry of the earlier state applications for electronic surveillance, the disclosure requirements of section 2518(1)(e) were not flouted. The motion to suppress was properly rebuffed.[7]

IV. SUFFICIENCY OF THE EVIDENCE

While tacitly admitting the sufficiency of the evidence on count one of the redacted indictment (which involved his role in the North Margin St. poker games),

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[7] Zannino also argues that the evidence obtained at North Margin St. should be suppressed because the order authorizing electronic surveillance was not supported by probable cause. He did not raise this claim below and has, therefore, waived it for purposes of this appeal. *See United States v. Figueroa*, 818 F.2d 1020, 1025 (1st Cir. 1987); *United States v. Argentine*, 814 F.2d 783, 791 (1st Cir. 1987). In any event, the argument has no real basis.

appellant raises a sufficiency challenge to counts two and three. Our task is to determine whether any rational jury, taking the evidence in its totality and in the light most flattering to the government, could have found appellant guilty beyond a reasonable doubt. *See Cintolo*, 818 F.2d at 983. The evidence, of course, must be sufficient as to each essential element of the crime charged.

A. Barbooth Gambling.

As to count two, appellant takes a rifle-shot approach: he effectively concedes the legal adequacy of the government's proof in most respects, but asserts that the prosecution did not show that at least five persons were involved in conducting the unlawful barbooth gambling. Appellant is shooting blanks.

We start by observing that the five person minimum is expressly made an element of the offense with which Zannino was charged.[8] In the lexicon of section 1955, the term "conduct" embraces all who participate in the operation of the specified gambling business, that is, each and every person who performs any act, function, or duty necessary or helpful in the business' ordinary operation.

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[8] The statute provides in relevant part:

> Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be [guilty of a crime]. . . . As used in this section – "illegal gambling business" means a gambling business which – involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business. . . .

18 U.S.C. § 1955.

As we read it, the statute of conviction applies even to individuals who have no role in managing or controlling the business and who do not share in its profits. *Cf.* Joshua 9:21 (discussing "hewers of wood and drawers of water"). In sum, section 1955 proscribes any type or degree of participation in an illegal gambling business, except participation as a mere bettor. *Sanabria v. United States*, 437 U.S. 54, 70-71 n.26 (1978); *United States v. DiMuro*, 540 F.2d 503, 508 (1st Cir. 1976), *cert denied*, 429 U.S. 1038 (1977). Once this coign of vantage is established, the dampness of appellant's powder becomes readily apparent.

Based on tape recorded conversations and other evidence, the government's expert witness, Daly, testified that at least five persons were involved "in the managing, financing or running of [the] barbooth game from at least Christmas of 1980 through March of 1981." He identified the five as Angiulo, Zannino, Francesco Angiulo, Volgaropoulus, and Roberto, and described their roles in the enterprise. Appellant wastes little time on the first four – and with good reason; the evidence as to them was plenteous. He trains his guns instead on Roberto's inclusion, assailing the admission of Daly's testimony and denigrating the government's ancillary evidence. The volley misfires.

The court's allowance of Daly's opinion evidence cannot be faulted. *See United States v. Ladd*, 885 F.2d 954, 959 (1st Cir. 1989) (discussing trial judge's discretion in determining both admissibility of expert testimony and particular expert's qualifications); *United States v. Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987) (similar); *see also United States v. Lamattina*, No. 89-1208, slip op. at 7-8 (1st

Cir. Nov. 21, 1989). The jury, we think, was entitled to consider Daly's testimony and assess its credibility and probative value in light of all the evidence. Furthermore, Daly's testimony seems sufficiently record-rooted to sustain a finding that Roberto participated in operating the barbooth game.

Our conclusion concerning the adequacy of the proof anent Roberto's complicity, and thus, Zannino's guilt, is bulwarked by the other evidence corroborating Roberto's involvement. We offer a representative sampling:

1. Roberto was at North Margin St. no less than five times during the surveillance period.

2. Roberto, testifying as a defense witness, admitted being at the Demosthenes Club on various occasions in 1980-81 while barbooth was being played. (Although he said he was merely a player, the jury was not bound to believe that aspect of his story.)

3. In a February 1981 conversation, Zannino told Angiulo that he was sending for Roberto and Roberto's "partner," Vulgaropoulus, to resolve a discrepancy regarding the profits from the barbooth gambling business.

4. In a March 1981 conversation, Zannino and Angiulo gloated over the money that Roberto was bringing them from the game.

5. In November 1981, Vulgaropoulus and Roberto were arrested when state authorities raided the barbooth game. Gambling paraphernalia was seized on that occasion.

Viewing this evidence in conjunction with Daly's testimony, a rational jury could easily have found, beyond

any reasonable doubt, that Roberto performed a necessary, or at least facilitative, role in the ordinary operation of the barbooth gambling business.

B. Loansharking.

Appellant also asserts that there was insufficient evidence to sustain his conviction under 18 U.S.C. § 892(a). He notes that the statute requires that loans, to be extortionate, be made in a climate of fear – fear that "violence or other criminal mean" will follow hard upon nonpayment[9] – and he claims that there is no proof that he and the borrower, Smoot, reached a mutual understanding that physical harm could ensure if timely payments were not forthcoming on the $14,000 debt. While appellant is correct that the understanding of both creditor and debtor is crucial to proving a substantive violation of 18 U.S.C. § 892(a), *see United States v. DeVincent*, 546 F.2d 452, 454-56 (1st Cir. 1976), *cert denied*, 431 U.S. 903 (1977), his argument nevertheless fails.

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[9] The statute of conviction criminalizes the making of "any extortionate extension of credit." 18 U.S.C. § 892(a). Congress has defined an "extortionate extension of credit" as comprising:

> Any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

18 U.S.C. § 891(6).

Congress recognized that it might be difficult to prove the understanding of the creditor directly. Thus, the lawmakers went on to provide that "if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate. . . ." 18 U.S.C. § 892(b). The statute enumerated four factors: (1) that repayment is unenforceable through civil judicial processes; (2) that the loan requires interest greater than 45% per year; (3) that the loan exceeds $100; and (4) that the debtor reasonably believes that the lender either has used extortion to collect other debts or has a reputation for doing so. *See* 18 U.S.C. §§ 892(b), (c); *see generally United States v. Dennis*, 625 F.2d 782, 800-01 (8th Cir. 1980); *United States v. Annoreno*, 460 F.2d 1303, 1308-09 (7th Cir.), *cert. denied*, 409 U.S. 852 (1972). In effect, the statute creates a rebuttable presumption, triggered by proof of the statutory factors. *See United States v. Martorano*, 557 F.2d 1, 8 n.3 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978). Here, the requisite understanding of both creditor and debtor was satisfactorily established by objective evidence verifying the existence of the first three factors; by Smoot's testimony as to his beliefs; and by a demonstration, founded upon the totality of the evidence, that Smoot's fears were reasonable under the circumstances.

We need hardly pause over the introductory triad. Smoot's $14,000 debt was incurred in the course of illegal gambling activity; it was never reduced to writing; it was obviously unenforceable through the usual judicial channels; and it carried a usurious interest rate of at least 52%

per annum.[10] The evidence as to Smoot's expressed fears seems self-explanatory: Smoot testified that he believed Zannino to be Cincotti's boss; he knew Donato Angiulo's reputation for violence; and he feared the use of force if he did not make his scheduled payments. The plausibility of Smoot's trepidation cannot seriously be doubted. Evidence of a defendant's nexus to organized crime can be taken into account in evaluating reasonableness of a debtor's fears, *see DeVincent*, 546 F.2d at 456-57, and Zannino's own statement – he boasted incessantly about his reputation as a loanshark and his use of violence and threats to collect indebtednesses – established that he was a Capo Regime in the Patriarca Family. Smoot testified that, during the pendency of the debt, he was acutely aware of the reputation for violence possessed by both Zannino and Zannino's "collector," Donato Angiulo. Smoot knew of their involvement in organized crime and knew that he could be threatened with physical harm if he failed to make timeous repayments.

Given the statutory framework, the jury was unquestionably entitled to infer that, at the relevant times, Zannino and Smoot had a mutual understanding that physical harm could befall the latter if he delayed or defaulted in squaring his account with the former. The essential elements of the crime were proven.

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[10] The evidence showed that, in respect to the $2000 "piece" of the debt which Zannino assigned to Isabella, Smoot was charged interest equivalent to 104% per annum. Both rates were unlawful: the maximum legal rate in effect in Massachusetts at the time was 20%.

V. ZANNINO'S HEALTH

The cornerstone upon which Zannino's appeal rests is a claim that the district court abused its discretion by denying a motion to postpone his trial indefinitely. As a spinoff of this asseveration, appellant says that he was also prejudiced in that, as the trial proceeded, his physical and mental condition deteriorated to the point where he could not testify and was thus deprived of his constitutional right to aid his defense and present witnesses on his own behalf. We have combed the record and discovered more cry than wool.

A. Setting the Stage.

Zannino was hospitalized in 1977, having sustained a myocardial infarction, preceded by angina pectoris and congestive heart failure. During the next two years, he was hospitalized twice more; consequently, he was found unable to stand trial in a gambling prosecution unrelated to the instant case. He was readmitted to the hospital several times from early 1981 to mid 1983 due to chest pains and other symptoms. In September 1983, on the very day that the instant indictment was returned, appellant was hospitalized, complaining of chest pain. He was discharged in January 1984. This discharge diagnosis read: "Atherosclerotic heart disease, unstable angina pectoris, history of myocardial infarction, coronary insufficiency and congestive heart failure." Other brief hospitalizations followed. He continued under medical supervision.

Zannino moved to continue the racketeering trial, citing his ill health. Following an evidentiary hearing, the

district court found in June 1985 that the likelihood of myocardial infarction, high grade ventricular arrhythmia, or cardiac arrest were, in fact, remote. The court also found Zannino's angina and congestive heart failure to be treatable and controllable with proper medication and diet. The court noted that Zannino was to some extent responsible for exacerbating his health problems by failing either to follow prescribed diet for to take medication on schedule. The court concluded that, on balance, Zannino was able to stand trial.

The case against Zannino and his codefendants subsequently went forward. A jury was selected. On the day that opening statements began (July 10, 1985), appellant was again hospitalized. Six days later, he suffered a second myocardial infarction. With the government's consent, his case was severed from the ongoing trial of his codefendants. That trial lasted until February 28, 1986.

Meanwhile, the district court monitored Zannino's medical condition in connection with both his ability to stand trial and his eligibility for pretrial release. Much of what transpired has been described before, *see United States v. Zannino*, 798 F.2d 544, 545 (1st Cir. 1986) (per curiam), so we can be succinct. It suffices to observe that the medical opinions conflicted. Evidentiary hearings were held. Eventually, a panel of three renowned cardiologists reviewed Zannino's medical records at the district court's request and submitted a report. The judge then forwarded certain supplementary materials to the panel and posed some follow-up questions. In August 1986, the panel issued another report. Collectively, the reports (both of which were unanimous) concluded that Zannino suffered from chronic coronary heart disease,

not likely to improve, and had experienced myocardial infarctions and angina pectoris. Zannino was likely to undergo periodic bouts of chest discomfort regardless of whether he was on trial. The physicians noted, however, that the "vast majority of episodes of 'chest discomfort' . . . are rapidly relieved by oral medication [and are] not usually life threatening" and thus, "could be rapidly diagnosed as not requiring hospitalization." A lengthy trial would be likely to increase the frequency of such episodes; a shorter, less intense trial would be safer. The panel recommended certain precautions if such a trial were to occur: abbreviated trial days; periodic mid-trial medical examinations; continuous monitoring by electrocardiogram while in the courtroom; instant availability of emergency medications and supplies (including oxygen and a defibrillator); and the presence of medical personnel at the trial. The panel also suggested that Zannino be tried alone.

After reviewing the reports and balancing competing considerations, the district court concluded that, given the gravity of the charges and the permanent nature of Zannino's illness, the government's interest in trying Zannino outweighed the personal risks inherent in a specially tailored trial. Those risks, in the court's view, could be substantially reduced by a shorter trial on fewer charges, conducted under prophylactic conditions. To that end, the judge severed the most complex charges against Zannino (*e.g.*, racketeering by means of a continuing criminal enterprise), adopted the physicians' recommendations as to procedure and special arrangements *in toto*, denied the motion for an indefinite postponement, and ordered Zannino to stand trial on the three specific

offense counts which we have discussed. The trial went forward on January 27, 1987 and lasted about a month.[11]

B. Failure to Postpone.

A district court's to deny a continuance can be disturbed on appeal only for abuse of discretion. *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *Real v. Hogan*, 828 F.2d 58, 63 (1st Cir. 1987); *see also* Note, *A Capital Defendant's Right to a Continuance Between the Two Phases of a Death Penalty Trial*, 64 N.Y.U. L. Rev. 579, 593 (1989) (district judge's discretion to deny a continuance is limited only where refusal to grant more time infringes upon a constitutional right). Moreover, in a case where a continuance request is predicated on medical dangerousness, the judge must be given a relatively wide berth. He has firsthand knowledge of the defendant and his situation, gained over time; he knows the courtroom conditions and the circumstances of trial intimately, and possesses great familiarity with the scope and complexity of the litigable issues; he has the ability to question health care providers and solicit additional opinions; he can best sift overstatement from understatement, eyeing the defendant's and the doctors' credibility, and tempering the prosecutors' zeal; and he will usually have developed a "feel" for factors like intensity and stressfulness. We believe it is perilous for an appellate tribunal, traversing the frozen tundra of an inert record, to secondguess the trial judge's informed

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[11] The court recessed for a week in the middle of trial (February 17-24) so that appellant could undergo medical tests in a hospital setting. The testimony concluded shortly thereafter. The jury returned its verdict on March 6.

synthesis of the relevant integers which enter into so ramified an equation. *See United States v. Bernstein*, 417 F.2d 641, 643 (2d Cir. 1969) ("The determination of competence to stand trial is basically a question of fact; [and] the trial judge is in a better position to resolve it than the appellate courts.").

While we give deference to the district court's assessment, we do not owe it blind allegiance. We look to see whether the court below had evidence before it which was, qualitatively and quantitatively, sufficient to support the decision which it reached. *See United States v. Alexander*, 869 F.2d 808, 811 (5th Cir. 1989); *United States v. Brown*, 821 F.2d 986, 988 (4th Cir. 1987); *Bernstein*, 417 F.2d at 643; *see also Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988) (stating test for abuse of discretion). The mere possibility of an adverse effect on a party's wellbeing is not enough to warrant a postponement. We agree with the Fourth Circuit that "the medical repercussions must be serious and out of the ordinary; the impending trial must pose a substantial danger to a defendant's life or health." *Brown*, 821 F.2d at 988. Throughout, we bear in mind that our function is one of review, not of independent evaluation: if the evidence can, on balance, fairly sustain either of two plausible conclusions, and the lower court chose one, we have no right to interfere.

Because circumstances vary so widely, we can present no all-inclusive checklist of the factors which bear on such a determination. When a colorable claim of medical dangerousness is lodged and contested, the court must carefully investigate the situation, assemble the pertinent data, and then consider not only the medical evidence but

also the defendant's activities (in the courtroom and outside of it), the steps defendant is taking (or neglecting to take) to improve his health, and the measures which can feasibly be implemented to reduce medical risks. Once a dangerousness quotient is established, the judge must weigh the foreseeable risks against the demonstrable public interest, taking into account factors such as the severity of the charges and the extent of the government's interest in trying the defendant. If the perceived risks overbalance the perceived benefits, a continuance must be granted.

In the case at bar, we note approvingly that the court gave appellant ample time to allow his condition to ameliorate or stabilize. The court also took elaborate pains to gather the best information and opinions obtainable: the parties were allowed full rein to present their evidence; the judge then solicited assessments from three eminent (and detached) cardiologists. The court considered the medical opinions, the defendant's activities, the foreseeable risks (including the fact that a trial would doubtless subject Zannino to considerable emotional strain, thus aggravating his angina attacks and perhaps exacerbating other health problems)[12], the nature of the charges, their

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[12] Zannino's underlying problem was diagnosed authoritatively as coronary atherosclerosis (the narrowing of the coronary arteries). Absent surgical intervention in the form of by pass surgery or angioplasty (measures Zannino has thus far rejected), this condition is permanent and progressive. Zannino's coronary atherosclerosis was the likely principal cause of his two myocardial infarctions. The atherosclerosis has also afflicted Zannino for years with angina pectoris (recurrent attacks of chest pain). Angina is usually relieved by the ingestion of nitroglycerin tablets, a form of treatment that the court found Zannino had employed successfully.

separability, the public interest in a trial, the defendant's right to assist in his own defense, the prospect that more time might alter the scales' angle, and a series of intangibles. All in all, the court appears to have weighed the correct factors. The question then becomes whether, in constructing the balance, the court committed a meaningful error in judgment. *See Independent Oil and Chemical Workers*, 864 F.2d at 929 (so long as the proper factors have been considered, judicial discretion is abused only if "the court makes a serious mistake in weighing them").

We review the district judge's findings and the balance he struck. The judge found that Zannino would have chest pains whether or not he was in court; that, in all likelihood, his angina attacks could be palliated by oral medication; and that such attacks, although potentially serious if not relieved, were not life threatening. The judge noted that much of the maintenance of defendant's health was in his own hands; he was responsible for monitoring his diet and medication in order to avoid untoward consequences. The court fully considered the ravages of trial and concluded that, while a trial "would increase the risk of [Zannino's] sustaining another life threatening coronary incident in some degree that is neither trivial nor precisely measurable," the danger was not undue. And the court found that the public interest in bringing Zannino to trial was great.

In addition, the district court took substantial steps to reduce the medical risks incident to trial. First, it ordered Zannino tried alone and several most of the charges against him, leaving only three. These three were handpicked to create both a shorter trial and one likely to curtail wear and tear on the defendant (emotional as well

as physical).[13] Second, the normal trial day and week were abbreviated. Third, special medical safeguards were made available, including provisions for periodic medical examinations during trial, continuous coronary monitoring, and on-the-spot accessibility to medical equipment. Two emergency medical technicians were in attendance during court sessions. An ambulance was parked in the courthouse garage. These precautions not only minimized the chance that a tragedy would occur, but must have served to ease the defendant's health-related concerns.

We acknowledge that a stand-trial determination in the case of an ailing defendant is among the most problematic that a federal district judge is called upon to make. "Whether a defendant's physical condition is so poor as to require a continuance or severance is not only a difficult determination . . . , but it is one which carries with it the tremendous responsibility of weighing the invariably unpredictable factor of defendant's health against the government's, indeed the public's, legitimate interest in a fair and speedy disposition." *Bernstein v. Travia*, 495 F.2d 1180, 1182 (2d Cir. 1974). A criminal trial is by its nature ordealistic – but that fact alone cannot abrogate the pronounced public interest in bringing promptly to book those accused of high crimes and felonies. *See id.* In this case, the crimes charged were of the gravest order and the defendant's involvement was alleged to be at the uppermost level. His medical condition

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[13] One rough measure of the success of the district court's pruning is that Zannino's separate trial, notwithstanding truncated days, lasted approximately one-eight as long as the trial of Granito and the Angiulo brothers.

was unlikely to improve, rendering a continuance functionally equivalent to a permanent ban against trial. In ordering Zannino into the dock, the court below carefully evaluated these factors and the other pertinent considerations; tailored the charges to fit the defendant's physical and emotional resources; and utilized critical firsthand impressions that we lack. We cannot say that the district judge – whose thoroughness resonates from every page of the record pertaining to this issue – misused his broad discretion.

Because the dangerousness quotient, though palpable, was not excessive, the denial of appellant's motion for a continuance was permissible. *See, e.g., Alexander*, 869 F.2d at 811 (trial judge's reasoned determination that defendant was physically able to testify in his own behalf and stand trial must prevail absent abuse of discretion); *United States v. Pastor*, 557 F.2d 930, 939 (2d Cir. 1977) (where defendant suffered from angina pectoris but trial judge had implemented sufficient safeguards, deference was justified); *Travia*, 495 F.2d at 1182 (similar); *see also Brown*, 821 F.2d at 989. The perceptible risks inherent in a specially-structured trial did not overbalance the perceptible benefit to the public.

C. Deleterious Effects of Trial.

Appellant also asserts that his health deteriorated under the strain of trial, creating a special sort of prejudice. The thesis runs along the following lines: in his opening statement, defense counsel, not knowing how the vagaries of trial would affect a sick man, told the jury that Zannino's testimony was crucial to an understanding

of the case; due to failing health, however, Zannino proved unable to testify when it came time for the defense case; thus, the jury, expecting to hear Zannino's testimony, most probably held his failure to testify against him. In this way, appellant says that he was deprived of due process.

We find this logomachical frock gaping at several seams. Most critically, there is not a shred of evidence that Zannino's condition worsened to the point where he became medically unable to testify. There was excellent reason, tactically, for Zannino to avoid the witness stand. That he decided not to testify, and that his counsel intimated to the jury that his health precluded him from testifying, is a far cry from proving either the claimed deterioration or the etiology of the decision to stay off the witness stand. No further medical evidence was presented during the course of the trial and no change in circumstances was shown. On these facts, the assignment of error is infirm.

There is also a second reason why the initiative collapses. We have scoured the record without unearthing any indication that the defense made a motion for mistrial, or any other appropriate relief, at the point when Zannino "believed" that he could no longer testify. In our view, appellant's present claim is toppled by his neglect to ask for a further continuance, or a mistrial, to meet the supposed exigency of which he now complains. *Cf. e.g., United States v. Diaz-Villafane*, 874 F.2d 43, 47 (1st Cir.), *cert. denied*, 110 S.Ct. 177 (1989); *United States v. Ingraldi*, 793 F.2d 408, 413 (1st Cir. 1986). If there was a legitimate problem, it was incumbent upon Zannino to bring it to the trial court's attention in a timely fashion and ask for

concinnous relief. The failure to do so constitutes a waiver.

VI. POTPOURRI

We touch briefly upon certain other points raised by appellant, none of which requires extended comment.

A. Severance.

After the district court narrowed the scope of trial to the three counts described *supra*, appellant moved for a further severance, alleging misjoinder. Fed. R. Crim. P. 8(a), 14. The district court denied the motion. Zannino polemizes against the ruling, but to no avail.

Rule 8(a) authorizes joinder of offenses if they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." All of the three offenses involved here were alleged by the Grand Jury to be predicate acts committed in furtherance of the racketeering enterprise and conspiracy. This court, and other courts of appeals, have consentiently held that offenses committed pursuant to the same (charged) racketeering enterprise and conspiracy may be joined in a single indictment since, in the terminology of Rule 8(a), they are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." *See, e.g., United States v. Doherty*, 867 F.2d 47, 63 (1st Cir.), *cert. denied*, 109 S.Ct. 3243 (1989); *United States v. Kragness*, 830 F.2d 842, 861-62 (8th Cir. 1987); *United States v. Williams*, 809 F.2d 1072,

1085-86 (5th Cir.), *cert. denied*, 484 U.S. 896 (1987); *United States v. Caporale*, 806 F.2d 1487, 1510 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987). The happenstance that appellant was not tried on the RICO count did not alter the calculus; indeed, the same joinder principle applies even if the RICO offense was not charged against the particular defendant. *See United States v. Manzella*, 782 F.2d 533, 539-40 (5th Cir.), *cert. denied*, 476 U.S. 1123 (1986); *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

Not only were the three counts properly joined, but appellant has not made the requisite showing of prejudice to warrant separating them. Given the trial court's precise instructions, the relative simplicity of the evidence, and the fact that Zannino was tried alone, it borders on the frivolous to claim that the failure to isolate the three residual charges from each other deprived him "or a fair trial, resulting in a miscarriage of justice." *United States v. Arruda*, 715 F.2d 671, 679 (1st Cir. 1983); *see also United States v. Walker*, 706 F.2d 28, 30 (1st Cir. 1983); Fed. R. Crim. P. 14. There was no misuse of the district court's considerable discretion.

B. Evidence Admitted.

Appellant contests the introduction of certain tape-recorded conversations. We need not flog a moribund mare; having reviewed his contentions and the indicated conversations, we find that the challenged recordings were sufficiently relevant so as to be admissible in the trier's discretion. That being so, the district court was required to strike a balance between probative worth and

likely prejudice. *See* Fed. R. Evid. 403. Our perscrutation of the nisi prius roll reveals no reason to disrupt the lower court's calibration of the scales. "Only rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *Freeman v. Package Machinery Corp.*, 865 F.2d 1331, 1340 (1st Cir. 1988). This is not the rare case.

Zannino also complains about the jury having heard evidence of an earlier extortionate scheme which he allegedly operated with Thomas Peachie and Carmen Tortora. The complaint is jejune. The jury was entitled to find, from appellant's own mouth, that he was in league with Peachie and Tortora. The earlier scheme was reasonably proximate in time to the charge extortion.[14] And we, like the district court, believe that the material was competent, under Fed. R. Evid. 404(b), to show Zannino's criminal intent and extortionate understanding vis-a-vis the Smoot loan. *See, e.g., United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989); *United States v. Pepe*, 747 F.2d 632, 670-71 (11th Cir. 1984); *United States v. Zeuli*, 725 F.2d 813, 816-17 (1st Cir. 1984); *see generally Huddleston v. United States*, 485 U.S. 681 (1988).

C. Incorporation by Reference.

As mentioned earlier, *see supra* note 1, defendant's appeal was consolidated for oral argument with appeals

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[14] There was evidence that the earlier scheme continued up to one year, more or less, before Smoot's indebtedness was incurred.

prosecuted by the Angiulos and Granito. In a cursory reference in his appellate brief, Zannino seeks to "adopt[] all of the arguments made on behalf of co-defendants Gennaro, Donato and Michele Anguilo [sic], and co-defendant Samuel Granito, as each argument applies to this appellant." We summarily reject this ploy. The co-defendants were tried apart from Zannino, on a somewhat different array of charges. They have raised a series of issues which relate to their separate trial in ways not readily transferable to Zannino's circumstances.

Perhaps more important, we see no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. *See, e.g., Brown v. Trustees of Boston Univ.*, No. 88-1288, slip op. at 39 (1st Cir. Dec. 1, 1989); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988). It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. As we recently said in a closely analogous context: "Judges are not expected to be mindreaders. Consequently, a litigant had an obligation 'to spell out its arguments squarely and distinctly,' or else forever hold its peace." *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988) (quoting *Paterson-Leitch Co. v. Massachusetts Municipal Wholesale Elec. Co.*, 840 F.2d 985, 990 (1st Cir. 1988)).

VII. CONCLUSION

We need go no further. Our scrutiny of the case persuades us that all of Zannino's cotentions must be

rejected. No significant legal error appearing, appellant's convictions and his sentence must be

Affirmed

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE IV

Search and seizure. – The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

Presentment or indictment – Double jeopardy – Self-incrimination – Due process – Compensation for private property. – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

Rights of accused in criminal prosecutions. – In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state

and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.